

**UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF COMMERCE**

WEAVER'S COVE ENERGY, LLC

Appellant,

v.

MASSACHUSETTS OFFICE OF COASTAL
ZONE MANAGEMENT,

Respondent.

Case No.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION OF THE
CITY OF FALL RIVER FOR LEAVE TO INTERVENE**

The City of Fall River, Massachusetts ("Fall River") respectfully submits this memorandum of law in support of its motion for leave to intervene pursuant to Section 555(b) of the Administrative Procedure Act in the captioned matter.¹

I. BACKGROUND

This appeal arises out of a proposal by Weaver's Cove Energy, LLC ("Weaver's Cove") to construct and operate a liquefied natural gas ("LNG") import terminal on the Taunton River in Fall River, Massachusetts (the "Project"). The Project will be serviced by two natural gas pipelines that will be constructed by Mill River Pipeline, LLC ("Mill River"), an affiliate of Weaver's Cove, and it includes an LNG storage tank, vaporization equipment, an LNG truck distribution facility, as well as the replacement of a pier and the stabilization of waterfront at the proposed site. See Massachusetts Coastal Zone Management Federal Consistency Certification, Weaver's Cove Energy, LLC, LNG Terminal Construction and Maintenance and Improvement

¹ Fall River also has filed a motion to intervene in the appeal filed by Mill River Pipeline, LLC ("Mill River") relating to the Massachusetts Office of Coastal Zone Management's objection to Mill River's Federal Consistency Certification.

Dredging of Mount Hope Bay – Fall River Harbor Federal Navigation Channel and Turning Basin (Jan. 4, 2007). In addition, Weaver’s Cove proposes to dredge extensive portions of Mount Hope Bay and the Taunton River to allow LNG tankers to deliver LNG to the proposed terminal. Id.

In connection with these activities, Weaver’s Cove and Mill River are required to obtain numerous federal and state permits, licenses and certifications. Accordingly, the Project was subject to review under both the National Environmental Policy Act (“NEPA”) and the Massachusetts Environmental Policy Act (“MEPA”). As the lead federal agency, the Federal Energy Regulatory Commission (“FERC”) initiated NEPA review of the Project in 2003, including preparation of the various environmental impact statements required by NEPA. Upon request by Weaver’s Cove, the Secretary of the Commonwealth of Massachusetts Executive Office of Environmental Affairs (“EOEA”) agreed to coordinate its review of the Project with FERC’s review under NEPA.

As the host city for the Project, Fall River has been involved significantly in the environmental review and permitting process since it began. For example, during NEPA and MEPA review, Fall River submitted numerous public comments regarding the Project. In particular, Fall River submitted comments on the Draft Environmental Impact Statement² and numerous comments relating to issues raised in the Final Environmental Impact Statement prepared by FERC, and the Environmental Notification Form,³ the Draft Environmental Impact Report,⁴ the Supplemental Draft Environmental Impact Report,⁵ the Second Supplemental Draft

² Fall River submitted comments on the Draft Environmental Impact Statement on September 20 and 24, 2004.

³ Fall River submitted comments on the Environmental Notification Form on August 13 and 19, 2003.

⁴ Fall River submitted comments on the Draft Environmental Impact Report on September 20 and 24, 2004.

⁵ Fall River submitted comments on the Supplemental Draft Impact Report on December 7 and 8, 2004.

Environmental Impact Report,⁶ the Final Environmental Impact Report,⁷ and the Supplemental Final Environmental Report⁸ submitted to the EOE. In addition, Fall River also was permitted to intervene in the proceedings before FERC. See Weaver's Cove Energy, LLC and Mill River Pipeline, LLC, 12 FERC ¶ 61,070, at ¶ 15 (July 15, 2005).

In order to receive several federal permits for the Project, Weaver's Cove is required to comply with the Coastal Zone Management Act ("CZMA"), which requires the Massachusetts Office of Coastal Zone Management ("MCZM") to conduct Federal Consistency Review to determine whether the Project is consistent with the enforceable coastal policies of the Massachusetts Coastal Zone Management Plan. See 16 U.S.C. § 1456(3)(A); 15 C.F.R. Pt. 930. After completing review under NEPA and MEPA, Weaver's Cove submitted a final Federal Consistency Certification on January 4, 2007.

MCZM initiated its review of the Project on January 8, 2007 and provided public notice of its review on January 23, 2007. As it has in many other proceedings relating to the Project, Fall River submitted public comments regarding the Federal Consistency Certification on February 12, 2007. Fall River emphasized several procedural deficiencies in the certification and also expressed concern that the Project does not satisfy many of the enforceable policies of the Massachusetts Coastal Zone Management Plan, including numerous policies that relate to water quality, habitat issues, protected areas, coastal hazards, port and harbor infrastructure and energy.

Pursuant to the six-month review period prescribed by the federal and state regulations, MCZM was required to concur with or object to the Federal Consistency Certification no later than July 8, 2007. See 15 C.F.R. § 930.62(a); 301 C.M.R. 21.07(3)(e). On April 6, 2007,

⁶ Fall River submitted comments on the Second Supplemental Draft Impact Report on December 9, 2005.

⁷ Fall River submitted comments on the Final Environmental Impact Report on April 7 and 10, 2006.

⁸ Fall River submitted comments on the Supplemental Final Environmental Impact Report on July 21, 2006.

several months before the conclusion of the review period, MCZM reminded Weaver's Cove that its decision on the Federal Consistency Certification is contingent on prior receipt of all necessary state permits, licenses and certifications.⁹ MCZM requested that Weaver's Cove provide all such permits, licenses and certifications to MCZM by June 8, 2007 to ensure that MCZM was able to complete its review by the July 8, 2007 deadline.¹⁰ On June 6, 2007, Weaver's Cove requested a stay of MCZM's review of the Federal Consistency Certification to allow Weaver's Cove to obtain permits pending before the Massachusetts Department of Environmental Protection ("DEP").¹¹ After MCZM agreed to stay the proceedings, however, Weaver's Cove informed MCZM by letter dated July 2, 2007 that it would not agree to a stay of the review period.¹² In the absence of a stay, MCZM objected to the Federal Consistency Certification on the basis that Weaver's Cove had not provided to MCZM several state licenses and permits.¹³ MCZM stated that, among others, it had not received a § 401 Water Quality Certification from the DEP for dredging activities related to the Project, a Chapter 91 Waterways license for construction and use of parts of the Project that are located in filled or flowed tidelands, and a Chapter 91 Waterways permit for dredging activities within flowed tidelands.¹⁴

On August 27, 2007, Weaver's Cove filed a Notice of Appeal with the Secretary of Commerce seeking an override of MCZM's objection to the Federal Consistency Certification for the Project. Fall River received notice of Weaver's Cove's appeal on August 30, 2007 when the Notice of Appeal was posted on FERC's electronic docket. No briefing schedule has been set at this time.

⁹ See Letter from Truman Henson, Jr., MCZM, to Michael Howard and Theodore Barten, Epsilon Associates, Inc., Apr. 6, 2007.

¹⁰ Id.

¹¹ See Letter from Ted Gehrig, Weaver's Cove Energy, LLC, to David Janik, CZM South Coastal Regional Coordinator, June 6, 2007.

¹² See Letter from Ted Gehrig, Weaver's Cove Energy, LLC, to Bruce K. Carlisle, MCZM, July 2, 2007.

¹³ See Letter from Bruce K. Carlisle, MCZM, to Ted Gehrig, Weaver's Cove Energy, LLC, July 6, 2007.

¹⁴ See id.

II. ARGUMENT

Fall River is entitled to intervene in this matter on the basis of the right created by the Administrative Procedure Act (“APA”). Section 555(b) of the APA provides in relevant part:

So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary or otherwise, or in connection with an agency function.

5 U.S.C. § 555(b). It is universally understood that this section establishes “the right of an interested person to participate in an on-going agency proceeding.” Advanced Sys. Tech., Inc. v. The United States, 69 Fed. Cl. 474, 484 (2006); 6 James Wm. Moore et al., *Moore’s Federal Practice* § 24.02[4][a] (3d ed. 2007) (“Interested persons are entitled to participate in agency proceedings, provided such participation does not disrupt the orderly conduct of public business.”).

A. Fall River Is An Interested Person Under The APA.

As a preliminary matter, Fall River is entitled to intervene in this proceeding because it has a substantial interest in the Project and more specifically, in the Secretary’s consideration of whether the Project satisfies the requirements for an override of MCZM’s objection.

In its Notice of Appeal, Weaver’s Cove argues that the Secretary should override MCZM’s objection for any one of three reasons. As a threshold matter, Weaver’s Cove argues that MCZM’s objection did not comply with the CZMA and applicable regulations because Weaver’s Cove provided MCZM with information required by the regulations and other necessary information. Substantively, Weaver’s Cove claims that the Secretary should override MCZM’s objection because the Project is consistent with the objectives of the CZMA, and/or that the Project is in the interest of national security.

As the host city, Fall River has been the primary public participant throughout the myriad environmental review and permitting processes associated with the Project.¹⁵ In addition to submitting numerous public comments during NEPA and MEPA review, Fall River also submitted public comments specifically relating to MCZM's review of the Federal Consistency Certification for the Project. Further, as any decision by the Secretary to override MCZM's objection would allow the federal permitting process to proceed, Fall River has a substantial interest in the outcome of this proceeding. See City of Sausalito v. O'Neill, 386 F.3d 1186, 1201 (9th Cir. 2004) (city has standing to challenge directly an improper consistency determination because "adversely affected local governments are within the 'zone of interests' of the CZMA, as parties 'adversely affected or aggrieved' by an improper consistency determination"); see also Mausolf v. Babbitt, 85 F.3d 1295, 1301 (8th Cir. 1996) (complaints of environmental harms were sufficient to establish standing and basis to intervene as of right under the more stringent standard of Fed. R. Civ. P. 24(a)). Indeed, Congress specifically recognized the important role that local municipalities play in protecting the coastal zone. One of the primary policies supporting the CZMA is "to encourage the participation and cooperation of the public, state and local governments, and the interstate and other regional agencies, as well as of the Federal agencies having programs affecting the coastal zone, in carrying out the purposes of this chapter." 16 U.S.C. § 1452(4) (emphasis added).

Moreover, municipalities have been permitted to intervene in appeals before the Secretary where the municipality has a strong interest in the subject of the appeal. See e.g., Decision and Findings in the Consistency Appeal of Virginia Electric and Power Company from an Objection by the North Carolina Department of Environment, Health and Natural Resources

¹⁵ For example, Fall River also has participated in the permitting processes before FERC, the Army Corps of Engineers, the U.S. Coast Guard, and the DEP, along with numerous state permitting, licensing and certification proceedings.

(May 19, 1994) (allowing the City of Virginia Beach to intervene to represent its interest in a proposed pipeline); Decision and Findings in the Consistency Appeal of Amoco Production Company from an Objection by the Division of Governmental Coordination of the State of Alaska (July 20, 1990) (inviting an interested municipality and a local whaling commission to file briefs because they had an interest in issues germane to the appeal).

B. Fall River's Participation Will Not Delay The Proceedings.

In addition to its strong interest in the subject of the present appeal, Fall River's motion to intervene is timely and will not impede the orderly conduct of public business. See 5 U.S.C. § 555(b). Weaver's Cove submitted its Notice of Appeal on August 27, 2007. A briefing schedule has not been established for this appeal as of yet, however, the applicable regulations require that Weaver's Cove submit its principal brief in support of the appeal within thirty days of the notice of appeal. See 15 C.F.R. § 930.127(a). MCZM is required to submit a brief within sixty days of the notice of appeal. See id.

If Fall River is permitted to intervene in this matter, Fall River is prepared to file a brief pursuant to the briefing timeline applicable to MCZM. Accordingly, there will be no delay in the Secretary's resolution of Weaver's Cove's appeal.

C. Additional Factors Support Intervention By Fall River.

Fall River clearly satisfies the APA's minimal requirements for intervention because it is an interested person and its participation will not delay the proceedings. Several additional factors not required by the APA also support intervention by Fall River in this appeal. First, as the host city, Fall River has an interest in the Project that is different from that of any other party, including MCZM. While Fall River's interests may overlap to some extent with those of MCZM, Fall River's interests are distinct to the extent that it will bear the brunt of any harm

caused by the construction and operation of the Project and the related impacts to the coastal zone surrounding the city.

Because MCZM objected to the Federal Consistency Certification on procedural grounds, it is also unclear what substantive position MCZM will take in this appeal and whether MCZM's position will address the substantial public safety concerns that Fall River has voiced throughout the development and review of the Project. Cf. Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10 (1972) (under the more stringent intervention standard set forth in Fed. R. Civ. P. 24(a), a would-be intervenor only must show "that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal.>").

In addition, as Fall River has provided public comments during numerous stages of review and permitting of the Project, Weaver's Cove will not be prejudiced by Fall River's participation in this appeal. To the contrary, Fall River's participation will have little, if any, impact on the timing of the appeal.

Finally, the standard for intervention should be construed liberally in favor of the would-be intervenor. See 6 James Wm. Moore et al., Moore's Federal Practice § 24.03[1][b] (3d ed. 2007) (applying a liberal standard for intervention under Fed. R. Civ. P. 24(a), which establishes a more stringent standard than the APA).

Under these circumstances, Fall River should be allowed to intervene in this appeal as it is an interested person and its participation will not impede the orderly conduct of these proceedings.

III. CONCLUSION

For the foregoing reasons, Fall River respectfully requests that its motion to intervene be granted.

CITY OF FALL RIVER

By its attorneys,

A handwritten signature in black ink, appearing to be 'R. Lepore', with a long, wavy horizontal line extending to the right.

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September 6, 2007

CERTIFICATE OF SERVICE

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